

1 J. Leah Castella (SBN 205990)  
E-mail: lcastella@bwslaw.com  
2 Benjamin L. Stock (SBN 208774)  
E-mail: bstock@bwslaw.com  
3 BURKE, WILLIAMS & SORESENSEN, LLP  
1901 Harrison Street, Suite 900  
4 Oakland, CA 94612-3501  
Tel: 510.273.8780 Fax: 510.839.9104

5 Attorneys for Defendant  
6 CITY OF EMERYVILLE

FILING FEE EXEMPT PURSUANT TO  
GOVERNMENT CODE § 6103

7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10

11 CALIFORNIA RESTAURANT  
ASSOCIATION, a California nonprofit  
12 mutual benefit corporation,

13 Plaintiff,

14 v.

15 CITY OF EMERYVILLE, a California  
municipal corporation,

16 Defendant.  
17

Case No. 3:16-cv-06660-JST

**NOTICE OF MOTION AND MOTION BY  
DEFENDANT CITY OF EMERYVILLE TO  
DISMISS PLAINTIFF CALIFORNIA  
RESTAURANT ASSOCIATION'S  
COMPLAINT**

**Date: March 9, 2017**

**Time: 2:00 p.m.**

**Place: Courtroom 9 – 19<sup>th</sup> Floor**

18 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

19 **PLEASE TAKE NOTICE** that on March 9, 2017 at 2:00 p.m. or as soon thereafter as the  
20 matter may be heard before the Honorable JON S. TIGAR in Courtroom 9 of the United States  
21 District Court, 450 Golden Gate Avenue, 19<sup>th</sup> Floor, San Francisco, California 94102, Defendant  
22 CITY OF EMERYVILLE (“Emeryville”) will and hereby does move the Court to Dismiss the  
23 Complaint for Violation of Federal Civil Rights Under 42 U.S.C. § 1983 and California State  
24 Law (Cal. Gov’t Code § 65863, Declaratory and Injunctive Relief (“Complaint”) of Plaintiff  
25 CALIFORNIA RESTAURANT ASSOCIATION (“CRA”). This Motion is made under rules  
26 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

27 ///

28 ///

1 As to **Count One** (violation of the federal Taking Clause of the Fifth Amendment to the  
2 U.S. Constitution by unconstitutional physical taking, unconstitutional condition, and taking for  
3 private use):

4 1. CRA's claim that Emeryville Municipal Code § 5-37-04 ("the Service Charge  
5 Requirement) is barred by the doctrines of standing and exhaustion.

6 2. CRA's members have no compensable property interest in the funds they collect  
7 as service charges.

8 As to **Count Two** (alleged violation of the First Amendment to the U.S. Constitution and  
9 Article I, Section 2 of the California Constitution):

10 1. The Service Charge Requirement regulates conduct and not speech.

11 2. In the alternative, the Service Charge Requirement is a constitutional limit on  
12 commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*,  
13 447 U.S. 557 (1980).

14 As to **Count Three** (alleged violation of the Fourteenth Amendment to the U.S.  
15 Constitution and Article I, Section 7 of the California Constitution):

16 1. The Service Charge Requirement is supported by a rational basis and furthers  
17 Emeryville's interests.

18 As to **Count Four** (alleged violation of the Supremacy Clause of the U.S. Constitution  
19 and Preemption of State Law):

20 1. The Service Charge Requirement is not preempted by the FLSA.

21 2. The Service Charge Requirement is not preempted by federal tax law.

22 3. The Service Charge Requirement is not preempted by California labor law.

23 4. The Service Charge Requirement is not preempted by California tax law.

24 This motion is based upon this Notice of Motion, the accompanying Memorandum of  
25 Points and Authorities, the Request for Judicial Notice, and the Appendix of Non-Federal  
26 Authorities filed and served herewith, and any and all pleadings and papers on file in this action,

27 ///

28 ///

1 oral argument and upon such other matters as may be presented to the Court at the time of  
2 hearing.

3 Dated: January 31, 2017

BURKE, WILLIAMS & SORENSEN, LLP

4

5

By: /s/ J. Leah Castella

6

J. Leah Castella

7

Benjamin L. Stock

8

Attorneys for Defendant

9

CITY OF EMERYVILLE

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28